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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 551

STATE OF TEXAS,

Petitioner,

vs.

CENTRAL POWER & LIGHT COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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The Attorney General of the State of New Jersey on behalf of the State of New Jersey, *amicus curiae*, submits the within brief in support of the prayer of the State of Texas that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, entered in the above case on September 29, 1966. At least one of the creditors of Central Power & Light Company whose intangible property is the subject of an escheat in the instant matter shows a last known address in the State of New Jersey.

Opinions Below

The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District entered September 29, 1966, is reported at 410 S. W. 2d 18 (1966). The findings of fact and conclusions of law of the District Court of Nueces County, Texas, are unreported and are printed in Appendix B to the brief of the State of Texas (Pb32 to Pb34).

Jurisdiction

The Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas entered judgment in this case on September 29, 1966. The Supreme Court of Texas, by order dated May 10, 1967, refused petitioner's application for writ of error to review the judgment below. Petitioner's motion for rehearing of its application for writ of error was overruled on June 7, 1967.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Where a corporation holds unclaimed monies payable to persons whose last known addresses are in states which do not have jurisdiction over the corporation or the *res*, and said corporation is not formally qualified to do business in said states and there is nothing in the record showing that the corporation is otherwise subject to service of process in said states, did *Texas* v. *New Jersey, et al.*, 379 U. S. 674 (1965) extinguish the power of the state of corporate domicile to take custody of these funds under its escheat law?

Statutes Involved

The relevant statutes involved in the instant matter are set forth in Appendix C to the brief of petitioner, State of Texas (Pb36 to Pb41).

Statement of the Case

This action originated on March 28, 1964, when petitioner filed its plaintiff's original petition in the 94th District Court of Nueces County, Texas, asking that certain personal property held by respondent be declared escheated under the provisions of Article 3272a, Texas Civil Statutes (Vernon, 1962 Supplement). The property involved included unclaimed dividends held by the respondent corporation for certain of its shareholders whose last known addresses were, according to the corporate books and records, in states other than the State of Texas. It is undisputed that the respondent, a corporation chartered under the laws of the State of Texas, does not transact business outside the State of Texas nor does it hold a certificate of authority to transact business in any other state (Trial Court Finding of Fact No. 4, Pb33-6 to 16).

On September 10, 1965, the District Court entered its judgment decreeing the escheat of personal property held by respondent, including the dividends held for persons with last known addresses in states other than Texas. The District Court's finding of fact No. 4 and conclusions of law Nos. 5, 6, and 7 supported the judgment of escheat of such dividends and showed that court's agreement with petitioner's contentions. Such finding and conclusions read as follows:

> "4. I find that Central Power & Light Company is a corporation chartered under the laws of the State of Texas and that such company does not transact any business in any other state nor has it been granted permission to transact business in any other state nor has it been granted permission to transact business in any other state." (Pb33-6 to 16)
>
> "5. I conclude that the laws of the states which are shown to be the states of last known address of per-

sons for whom dividends payable on the 7%, 6%, and 4% Preferred Stock of Central Power & Light Company are held make no provision for the escheat of such dividends.*

6. I conclude that no other state has in personam jurisdiction of Central Power & Light Company and in the absence of such personal jurisdiction no other state has the power to escheat property held by Central Power & Light Company even though the last known address of the person entitled thereto may be within such other state.

7. I conclude that personal jurisdiction over the holder of personal property is essential to the power of a state to escheat property under its laws." (Pb34-7 to 22)

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* It must here be noted that on June 28, 1967 N.J.P.L. 1967, Chapter 135 was approved by the Governor of New Jersey and took effect on that date. In pertinent part, this enactment amended N.J.S. 2A:37-30, the New Jersey Statute upon which the trial's court conclusion of the law No. 5 was made. The old law is set out in Appendix C to petitioner's brief (Pb40 to Pb41). The pertinent portion of the 1967 amendment may be found in Appendix A to the brief of the State of New Jersey. The applicable significance of this change to the New Jersey law is that it permits escheat of unclaimed dividends held by a foreign corporation ". . . subject to the laws of this State . . ." where the foreign corporation is a holder of such dividends payable by it to a person whose last known address, according to the records of the holder, is within New Jersey.

The amendment of 1967 permits New Jersey, as a state of last known address, to pursue in theory its custodial escheat procedure against the corporate holder. Nevertheless, New Jersey takes the position that despite the satisfaction of the statutory prerequisite under the rule of *Texas* v. *New Jersey*, this State is barred from commencing such an action if there exists a lack of *in personam* jurisdiction over the corporate holder.

The respondent's exception and notice of appeal were included in the judgment of the District Court. Respondent specifically excepted to the above quoted conclusions of the District Court by means of its Defendant's Bill of Exception No. 1 which was duly approved by the District Court. The question was presented on appeal to the Court of Civil Appeals by respondent's Second Point of Error before that court (410 S. W. 2d 18, 20).

The Court of Civil Appeals, acting solely on the authority of this Court's decision in *Texas* v. *New Jersey*, held that the District Court erred in its conclusions and rendered judgment decreeing that the dividends in question were not subject to escheat by the State of Texas (410 S. W. 2d 18, 26-27). Petitioner's hearing was timely filed in the Court of Civil Appeals and subsequently overruled by that court.

The question was presented to the Supreme Court of Texas by petitioner's Application for Writ of Error to review the judgment of the Court of Civil Appeals. The Supreme Court of Texas, by order entered on May 10, 1967, ordered that said application be refused. Petitioner's motion for rehearing of its application for writ of error was overruled on June 7, 1967.

Reasons for Granting the Writ

1. The decision of the Texas Court of Civil Appeals constitutes an unwarranted extension of the rule in *Texas* v. *New Jersey* and subverts the conceptions of this Court intended to ease and strengthen the administration of multistate escheats.

2. The decision of the Texas Court of Civil Appeals permits a corporate holder to retain the beneficial use of unclaimed funds until forced to pay such funds to a state of last known address. Such retention in private custody thwarts the recognized purposes of custodial escheat.

ARGUMENT

POINT I

The decision of the Texas Court of Civil Appeals concluding that *Texas* v. *New Jersey*, 379 U. S. 674 (1965) extinguished the power of a state of corporate domicile to take from the holder corporation unclaimed intangibles payable to persons whose last known addresses were in states which do not have *in personam* jurisdiction over the corporation, constituted an unwarranted extension of the rule established therein by the Supreme Court of the United States.

Texas v. *New Jersey, et al.*, 379 U. S. 674 (1965), final decree, 380 U. S. 518 (1965), motion for clarification and modification of opinion denied, 381 U. S. 931 (1965), motion for modification of decree denied, 381 U. S. 948 (1965), came before this Court for decision in 1965. The case was a natural progression from earlier decisions which recognized that some day the Court would have to deal with the conflicting claims of two or more states for the same unclaimed intangibles.

This apparently inevitable contest, was postponed when the Court had before it in 1959 an application by the State of New York for leave to file an original action against New Jersey alleging a controversy between the two states for unclaimed monies payable on travelers checks issued by American Express Company, a joint stock company organized under New York law and having its principal office in New York. When New Jersey answered and pointed out that New York's law did not cover these monies and that no justicable controversy in the constitutional sense existed between the states, the Court refused jurisdiction. *State of New York* v. *State of New Jersey*, 358 U. S. 924 (1959).

In *Western Union Tel. Co.* v. *Pennsylvania,* 368 U. S. 71 (1961) the Court had before it the conflicting claims of Pennsylvania and New York for unclaimed funds deposited in offices of Western Union Telegraph Company located in Pennsylvania for transmittal to points outside and within Pennsylvania. Western Union was a New York corporation doing business in Pennsylvania. The Pennsylvania Supreme Court sustained the power of Pennsylvania to escheat these unclaimed funds. 400 Pa. 337, 162 A. 2d 617 (1960). On appeal, this Court reversed, holding that there was an active controversy between New York and Pennsylvania for the same funds, and the question would have to be determined in a court with jurisdiction over both states, that is to say, the United States Supreme Court.

At this point in the historical development of the law of escheat it was clear that the state of corporate domicile had the power to take unclaimed intangibles from its corporations if there was no active controversy with another state asserting a claim for the same property. The judgment in favor of the domicile state barred any double escheat under the Full Faith and Credit clause of the United States Constitution, and any other state which later asserted a claim for the same intangible had to enforce its claim against the domicile state. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428 (1951).

It is the active controversy between two states which gives rise to a justicable controversy within the limits of the exercise of the original jurisdiction of the United States Supreme Court. If the corporate holder is not amenable to process in the address state, then no active or justicable controversy exists between these states. It would amount, at most, to a difference or dispute of a hy-

pothetical or abstract character. Where there is no justiciable controversy in the constitutional sense, the United States Supreme Court will not exercise its power of original jurisdiction. *Georgia* v. *Chattanooga*, 264 U. S. 472 (1924); *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937).

It was after *Western Union* that *Texas* v. *New Jersey*, 379 U. S. 674 (1965) came before the Court for decision. The State of Texas commenced an original action in the United States Supreme Court against New Jersey, Pennsylvania and Sun Oil Company, a New Jersey corporation authorized to do business in all states of the United States. Texas claimed a superior right to escheat unclaimed intangibles payable by Sun on the grounds that all of the "contacts" relative to these intangibles were in Texas. New Jersey contended that it had the superior right to escheat these claims on the grounds that Sun was organized and existed under its laws and was domiciled in the State of New Jersey. Pennsylvania claimed a superior right to escheat the intangibles on the ground that the principal executive office of Sun was in the State of Pennsylvania. The State of Florida intervened and claimed a superior right to escheat some of the intangibles involved which were payable to persons whose last known addresses on the corporate records of Sun were in Florida. We emphasize that Sun, the corporation defendant was authorized to do business in all of the claiming states and, accordingly, subject to service of process in such states. The holding in *Texas* that the state of last known address had the superior right to escheat where there was an active controversy between two or more states for the same unclaimed intangible property was a decision applicable solely to the factual situation there presented.

Equally important to the holding in Texas is what was not said. This Court in *Texas* held only that a state of last known address with an escheat law and with the necessary prerequisite of *in personam* jurisdiction over the corporate holder had a prior right to escheat vis-a-vis the domicile state. This Court did not hold that the state of domicile could not escheat unclaimed property as against a state of last known address which did not have an escheat law *enforceable* against the defendant corporation.

A conclusive indication that this Court did not intend to establish any novel jurisdictional rule in *Texas* is indicated by the statement at page 678 of 379 U. S.:

> ". . . The issue before us is not whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts, a jurisdiction which need not be exclusive. Compare *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Mullane* v. *Central Hanover Bank & Trust Co., supra; International Shoe Co.* v. *Washington,* 326 U. S. 310 . . . ."

With this as prelude, it may be seen that the Texas Court of Civil Appeals by its construction of *Texas* in the case *sub judice* has necessarily implied a drastic change in traditional concepts of jurisdiction and jurisdictional power. It has ruled, in effect, that the mere existence of a corporate creditor's last known address in a non-domicile state having an escheat law creates sufficient "contact" with the address state to preclude escheat by a state of corporate domicile. Such a result should not be lightly implied.

The "certain minimum contacts" jurisdictional rule which permits maintenance of a suit against a nonresident corporation and does not offend "traditional notions of

fair play" emanates in large measure from *International Shoe Company* v. *State of Washington*, 326 U. S. 310 (1945); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957); and *Hanson* v. *Denckla*, 357 U. S. 235 (1958).

The standards of this rule are summarized in *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L. J. 342, 351 (1958) as follows:

> "(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
>
> (2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'
>
> (3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of *forum non conveniens*."

By permitting an address state to extend its jurisdictional reach upon the facts herein set forth, the Texas Court of Civil Appeals has in a single stroke subverted the "minimum contacts" doctrine, and muddled multi-state escheat law.

POINT II

The interpretation and application of the rule of *Texas* to the case *sub judice* by the Texas Court of Civil Appeals permits the defendant to retain the beneficial use of unclaimed funds contrary to the recognized purposes of custodial escheat.

Nowhere in *Texas* is there any authority indicating that the power of a domicile state to take unclaimed funds from its corporations, subject to the right of another state to make a claim against the domicile state, was being extinguished. This basic power was established in *Standard Oil.* This Court in *Texas* did not adopt a new rule permitting the corporate holder to retain the beneficial use of unclaimed funds to which it has no moral or legal claim, to be applied where a corporation holds unclaimed funds payable to a person whose last known address was in a state with an escheat law, but where the corporation is not qualified to do business or otherwise amenable to process.

The result in *Texas* was reached upon the fundamental question of ease of administration and equity. 379 U. S. at page 683. To construe *Texas* as holding that corporations may now retain the beneficial use of unclaimed funds to which they had no moral or legal right before *Texas,* would be unjust, inequitable and create complicated problems of administration.

The attitude of the United States Supreme Court on allowing would be possessors to seize unclaimed personal property in their own possession is indicated in *Standard Oil* where the Court stated at page 435 of 341 U. S.:

> "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations."

If a corporate holder is not qualified to do business in the State of last known address and it does not show that it is otherwise subject to service of process in such state, the state of corporate domicile should be permitted to take the unclaimed funds from the corporation.

POINT III

The several academic and judicial readings of *Texas* v. *New Jersey* demonstrate the confusion generated by that decision and the need for this Court to speak to its jurisdictional scope.

Following the decision in *Texas* much speculation was engendered concerning the import and scope of the rule therein set forth. Particularly, inquiry centered on whether *Texas* eroded the traditional "contacts" tests for *in personam* jurisdiction developed through *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957).

In considering a proposed State statute for the disposition of unclaimed property, 3 *Harv. J. Legis.*, 135 (1965) the author comments, beginning at page 163:

> "Because *Texas* v. *New Jersey* eliminated any need for the escheating state to have jurisdiction over the holder, the language in the definitions previously making such jurisdiction a prerequisite to action under this act has been deleted from the definitions of 'banking organization,' 'financial organization,' 'life insurance corporation,' 'utility,' and all sections of the act which had a 'contacts' requirement. Rather than adopt the 'contacts' rule, which the Supreme Court felt would leave in permanent turmoil a question which should be settled once and for all, the Court decided to delineate a clear rule which would 'govern all types of intangible obligations like these.' *Texas* v. *New Jersey, supra,* at 678. Accordingly, now even in the absence of traditional 'contacts' between the state and the holder, the state can escheat property owed to a person whose last known address, as shown on the books of the holder, is in this state. . . ."

At page 186 of 3 *Harv. J. Legis.* the comment of the author proceeds as follows:

> "* * * But the 'contacts' with the holder necessary to have the right to escheat the property under *Texas* v. *New Jersey* (which are apparently none—see section 102), and the 'contacts' necessary to have jurisdiction over the holder in one's own state courts would seem to be two different standards. It would seem that the traditional 'contracts' [sic] tests retain their validity when thinking in terms of suing a non-resident holder in one's own state courts.

> Thus subsection (b) enumerates the conditions under which states have been held to have such traditionally sufficient 'contacts' as to sustain a suit. It is conceivable, of course, that an entirely new 'contacts' test would be approved for suing non-resident holders in one's own state courts. If the mere fact that the owner's last known address was in this state is accepted as sufficient 'contact' with the holder so that this state can get jurisdiction in its courts over a holder on that basis alone, then *all* escheat proceedings could be in the courts of the escheating state, and the remaining subsections of section 602 would be unnecessary. But if such a jurisdictional rule were accepted, it would seem that it would have to be restricted to the sphere of escheat proceedings, for the prospect of the application of such a jurisdictional rule to other areas of the law can be alarming."

The foregoing conclusions demonstrate the confusion resulting from readings of the *Texas* rule; confusion now compounded by the Texas Court of Civil Appeals. The converse lack of jurisdictional extension has been recognized by various other authorities. Note, 65 *Colum. L. Rev.* 1101, 1104 (1965); 60 *Nw. U. L. Rev.* 550, 557 (1965).

In 1967, the Supreme Court of New Jersey decided *State of New Jersey* v. *Amsted Industries*, 48 N. J. 544, 226 A. 2d 715 (1967). This was an appeal from that part of a judgment entered by the Superior Court of New Jersey, Chancery Division in favor of defendant, Amsted Industries, a New Jersey corporation, and against plaintiff, State of New Jersey, which held that unclaimed funds in the custody or possession of defendant payable to persons whose last known addresses on the defendant's records

were in the States of Florida, Kentucky, Massachusetts, New York and Virginia, States which have in effect an unclaimed personal property law and in which defendant is not formally qualified to do business, were not subject to taking by the State of New Jersey under the holding in *Texas* v. *New Jersey*.

In affirming, the New Jersey Supreme Court said in part:

> "We find nothing in the Supreme Court's opinion in *Texas* which lends any support to New Jersey's contention that the creditor's state supplants the state of incorporation only if the defendant has been authorized to do business there. Nor do we find any reason in policy or otherwise for such restriction. Under *Texas* the creditor's state now has the paramount interest and other states should do what they can to honor it. See 65 *Colum. L. Rev.* 1101, 1104 (1965). The mere fact that the defendant has not formally qualified to do business in the states in question does not necessarily mean that it is immune from their jurisdiction and service of process. Its actual activities within those states may well bring it within the currently expanding concepts and exercises of jurisdictional power. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 2 L. Ed. 2d 223 (1957); *cf. J. W. Sparks & Co.* v. *Gallos*, 47 N. J. 295 (1966). If we were to undertake to determine, in this escheat proceeding, the extent and jurisdictional effect of the defendant's actual activities in those states, we would indeed go a long way towards defeating the very simplicity and ease of administration sought by the Supreme Court in *Texas*." 48 N. J. at 548, 226 A. 2d at 717, 718.

Whether the New Jersey Supreme Court has properly construed *Texas* v. *New Jersey* is not at issue here. *Amsted* appears to invite state action upon the merest corporate caress by disregarding the absence of known "contact" with a creditor's state.

The case at bar, while similar, is not perfectly encompassed by *Amsted*. The Texas trial court found as fact that the holder corporation had not qualified to do business in any state other than Texas, *and did not transact business outside that State* (Pb33-6 to 16). Thus, there is lessened to the point of virtual nullity the possibility of jurisdictional contact through actual corporate activity bottoming *Amsted*. Unless corrected, this Court's decision in *Texas* will continue to be construed as an extension of the "contacts" doctrine. That this is not so must be made clear.

CONCLUSION

For the reasons discussed herein, it is respectfully urged that certiorari should issue to review the decision of the court below.

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APPENDIX

New Jersey Statutes Annotated, Section 2A:37-30

(a) Except as may be otherwise provided by subsections (b) and (c) of this section, whenever a corporation, partnership, limited partnership or other business association incorporated or organized under the laws of this State or whenever any natural person doing business and domiciled in this State shall have custody or possession of, or otherwise be the holder of, or shall have deposited with or given to an agent or trustee residing within or without of this State custody or possession of, stock dividends or any moneys and other accretions which are or shall be due or payable to any person as a dividend upon capital stock, preferred or common, or as interest payable upon bonds, indentures, notes or other formal instruments evidencing indebtedness or any moneys payable as wages to any person, or any moneys payable on other general cash obligations, and except as may be otherwise provided by subsections (b) and (c) of this section, whenever any corporation, partnership, limited partnership or other business associations incorporated or organized under the laws of any other State or of the United States or whenever any natural person doing business within or without this State, and subject to the laws of this State shall have custody or possession or otherwise be a holder of any moneys or other personal property which are due or payable by such holder to any person in any of the categories above enumerated whose last known address according to the records of the holder is within this State and the owner of, beneficial owner of, or person entitled to the same has been and remains unknown for *a* period of 5 successive years, or the whereabouts of such person has been and remains

unknown for a period of 5 successive years, or such person property has been and remains unclaimed for a period of 5 successive years, such moneys or other personal property shall be presumed abandoned and subject to delivery to the State Treasurer for safekeeping.